Supreme Court, U.S.
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No. 96 354

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1995

IN RE NORMAN BARDSLEY,

Petitioner

v.

POWELL, TRACHTMAN, LOGAN, CARRLE AND BOWMAN P.C., JOEL P. PERILSTEIN, JONATHAN K. HOLLIN, SCOTT E. BARDSLEY, LEIGH BARDSLEY, DAVID E. MILLER AND INOFAST MANUFACTURING, INC.,

Respondents

On Petition For Writ Of Mandamus As Denied By The Court of Appeals For The Third Circuit (Docket No. 96-1224) By Order of April 12, 1996, And As Denied Upon A Motion For Rehearing In Banc, By Order Dated May 31, 1996, Of A Motion Requesting The Issuance Of A Preliminary Injunction Denied By The United States District Court For The Eastern District Of Pennsylvania (Docket No. 95-2287) By The Order Dated February 12, 1996

PETITION FOR WRIT OF MANDAMUS

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61 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court for the Eastern District of Pennsylvania abuse its judicial discretion by denying petitioner's Motion for Preliminary Injunction to reinstate petitioner's rightful majority shareholder status of Inofast Manufacturing, Inc.? This, although petitioner has made a prima facie showing that defendants, deceptively and manipulatively, usurped petitioner's lawful majority shareholder status, as follows:

a) by first acquiring management control of Inofast Manufacturing, Inc., a Pennsylvania corporation, through a series of illegal stock issuances;

b) having so unlawfully acquired control of Inofast, by continuing to maintain that control in violation of the law.

2. Did the Court of Appeals for the Third Circuit abuse its judicial discretion by failing to exercise its power to issue a Writ of Mandamus to Compel the District Court to issue a Preliminary Injunction?

PARTIES TO THE PROCEEDINGS

1. Petitioner, Norman Bardsley, is a director and shareholder of Inofast Manufacturing, Inc. ("Inofast").

Respondents are as follows:

2. Scott Bardsley is petitioner's twin brother, who is a director and president of Inofast.

3. Leigh Bardsley is Norman and Scott's father, who purports to be a shareholder and director of Inofast. Petitioner maintains he is legitimately neither.

4. David Miller was a former shareholder and employee of Inofast. Miller purports to be a current shareholder which status petitioner disputes.

5. Powell, Trachtman, Logan, Carrle & Bowman P.C. ("The Law Firm" or "Powell Trachtman"). A Montgomery County law firm who from 1990 forward has served as outside counsel to Inofast, as well as has acted as counsel to Scott and Norman Bardsley regarding their interests in Inofast.

6. Joel P. Perilstein. An attorney employed by Powell Trachtman who during times material herein was handling Inofast's, Scott's and Norman's corporate and commercial matters. He is alleged to have personally participated in the fraudulent scheme to oust Petitioner as majority shareholder.

7. Jonathan K. Hollin. Another attorney employed by Powell Trachtman. Hollin is also claimed to have directly participated in the scheme to divest Petitioner of his majority shareholder status.

8. Inofast, a Pennsylvania corporation, was named as a nominal defendant in the District Court. Petitioner, as director and a shareholder, maintains the suit derivatively on its behalf. Inofast is also a necessary party for purposes of obtaining the relief that Petitioner seeks.

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CITATION OF THE OPINION SOUGHT TO BE REVIEWED

The Memorandum Opinion of the District Court for the Eastern District of Pennsylvania denying petitioner's Motion for Preliminary Injunction is reported at 916 F.Supp. 454, *Bardsley v. Powell, Trachtman, Logan, Carrle & Bowman, P.C.*

STATEMENT OF JURISDICTION

This Court has jurisdiction over a petition for Writ of Mandamus authorized by 28 U.S.C. § 1651(a).

Petitioner filed a Writ of Mandamus in the Court of Appeals for the Third Circuit (No. 96-1224) requesting that court to compel the lower court to grant petitioner's Motion for Preliminary Injunction which was denied by the District Court in the Memorandum Order dated February 12, 1996 (95-CV-2287). The Third Circuit Court denied the petition for Writ of Mandamus by Order dated April 26, 1996. Petitioner's subsequent Motion for Rehearing In Banc was denied by Order dated May 31, 1996.

STATEMENT OF THE CASE

For the purpose of this petition for Writ of Mandamus, the statement of the case can be confined to all factual circumstances relating to petitioner's Motion for Preliminary Injunction.

The central issue of this case is a series of alleged unlawful transactions involving the corporate issuance of shares of Inofast Manufacturing, Inc. stock for the purpose of divesting petitioner of his rightful majority shareholder status. The transactions in dispute were found by the District Court (Slip Opinion and Memorandum, "Findings of Fact") to have been achieved in the following manner:

> 1) Mr. Miller purchased 5,357.143 shares of authorized but unissued stock from Inofast which was financed by a bonus that Scott had unilaterally authorized Inofast to award Mr. Miller (District Court Finding #22).

2) Leigh was gifted his shares sometime in 1992 by Inofast which was the result of a meeting betweeen Scott and Leigh (District Court Finding #23).

3) Scott unilaterally caused the corporation to issue 2,142.857 shares to himself (District Court Finding #24).

4) Thus, Scott caused 12,857 additional shares to be issued *without Norman's knowledge or approval.* These shares were voted in such a manner as to allow Scott to gain control of the Board of Directors (District Court Finding #25)

5) Following the 1993 shareholders' meeting, Scott caused Inofast to issue an additional 5,359 bonus shares to himself, bringing his total to 18,751.857 shares, 1.857 more shares than Norman's interest. This transaction occurred pursuant to a shareholders' meeting held on October 19, 1993, attended by Leigh and Scott. Norman, who was in Austria, had requested an agenda prior to the meeting, but his request went unanswered (District Court Finding #26).

In response to the above developments, petitioner requested in the name of Inofast Manufacturing, Inc., derivatively, and on his own behalf, directly, that the District Court for the Eastern District of Pennsylvania enter a preliminary injunction including, *inter alia,* the following provisions:

"(b) determining and declaring that there are only 30,000 outstanding and issued shares of Inofast, of which 18,750 are owned by Norman Bardsley (petitioner) and 11,250 are owned by Scott E. Bardsley (respondent), and that the remaining 45,000 shares are held by Inofast as treasury stock;

(c) declaring that any other purported issuance, sale or transfer of shares of Inofast stock be rescinded and be null and void, and that all official corporate records be modified to reflect the terms of the Court's Order;

(d) declaring pursuant to Section 29(b) of the Securities Exchange Act that the 1989 Shareholders' Agreement, the Deferred Compensation Agreement with Guy Malick, and/or any other contract claimed by Defendants as purporting to justify or authorize the issuance of the disputed shares and/or relating to the issuance of same is or are null and void."

The provisions of 15 U.S.C. Sections 78j(b) (Section 10(b) of the Securities Exchange Act of 1934), 78aa, and 78cc(b) (Section 29(b) of the Securities Exchange Act of 1934) give a District Court jurisdiction to issue a preliminary injunction for violations of the Securities Act provisions cited.

The District Court denied petitioner's Motion for Injunctive Relief in its Memorandum Opinion, dated February 12, 1996 - having narrowly viewed the facts on the strict basis of the future financial consequences to Petitioner - on the sole ground that Petitioner had failed to demonstrate immediate irreparable harm. The District Court did not address the merits of petitioner's claims nor did it make conclusions that were either explicitly or implicitly established by the factual record, as a matter of law.

Petitioner subsequently filed a Petition for Writ of Mandamus in the Court of Appeals for the Third Circuit requesting the issuance of the preliminary injunction and an expedited appeal of the Order granting the Dismissal of Petitioner's Amended Complaint. This Motion was docketed under No. 96-1224. On April 12, 1996, the Third Circuit Court denied the Petition and referred same to the Merits Panel. A Motion for Rehearing In Banc from the denial of the Petition for Writ of Mandamus was denied on May 31, 1996. The Appeal from the Order dated February 12, 1996, denying a Preliminary Injunction, and the Order dated February 20, 1996, dismissing the amended complaint, is currently pending in the Court of Appeals for the Third Circuit.

For the purpose of this Petition for Writ of Mandamus in the Supreme Court of the United States, the only remaining issue is the denial of petitioner's Motion for Preliminary Injunction.

ARGUMENT

The factual record in this case established that the initial disputed issuance of 12,857 (sic. 12,857.143) shares as well as the 5,359 bonus shares subsequently issued were performed without petitioner's knowledge or approval (as confirmed by the District Court Findings ##25 & 26). Those findings clearly

refute any claim, as made by respondents, that the shareholders' agreement "authorized" such a share issuance because the court also found that all parties had agreed that the shareholders' agreement would be implemented by way of a gifting process (District Court finding #7) which was never performed (Findings ## 10 and 11). It was further factually established that petitioner was at all material times a director of the board and, previous to the transactions in dispute, a 62.5% majority shareholder of Inofast.

In *Estate of Soler v. Rodriguez,* 63 F.3d 45, at 54 and 55, the First Circuit Court of Appeals addressed similar factual circumstances to those presented in this case at bar, as follows:

> "It is by now well established that a corporation has a claim under § 10(b) if the corporation was defrauded in respect to the sale of its own securities by some or even all of its directors. (Citing *Goldberg v. Meridor,* 567 F.2d 209 and *Ruckle v. Roto Am. Corp.,* 339 F. 2d 24 at 54)

And, on page 55 of 63 F.3d:

> "The calculated concealment of the sale itself, *thus depriving CMT's disinterested directors of the opportunity to take steps to prevent it before it occurred,* was an omission to provide essential material information to the company regarding the stock sale. Indeed, accepting the allegations of the complaint to be true, *it is a reasonable inference that concealment of the proposed sale from CMT's board of directors was essential to the success of the fraud,* since the plaintiff directors controlled a majority of CMT's outstanding shares and would doubtless have acted to block the sale had they known." (emphasis added)

Finally, on page 55 of 63 F.3d:

> "As there was no "full and fair disclosure" to those legally empowered to act for the corporation, there was no full and fair disclosure to CMT itself."

Thus, the facts of this case immutably lead to the following conclusions, as a matter of law:

i) as there was no full and fair disclosure with regard to the corporate issuance of a total of 18,216.143 shares of Ino-

fast stock to petitioner, as a director of the board legally empowered to act for the corporation, there was no full and fair disclosure to Inofast itself;

ii) therefore, Inofast was defrauded with respect to the sale of 18,216.143 shares of its own securities and has a valid claim under 10(b) of the Securities Exchange Act of 1934 that said disputed transactions were unlawfully issued.

The traditional use of mandamus, as recently observed by the Third Circuit Court of Appeals in *Re School Asbestos Litigation,* 977 F.2d 764 at 792, 793, (citing *Roche v. Evaporated Milk Association,* 319 U.S 21, 26) is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction *or to compel it to exercise its authority when it is its duty to do so."* (emphasis added)

The Third Circuit Court went on to explain: "In our view, a district court's failure to consider the merits of a summary judgement motion is a failure to exercise its authority when it has a duty to do so." And further: "we believe that the refusal to adjudicate a critical part of a case is comparable."

The District Court in this case at bar failed to consider the merits of petitioner's preliminary injunction motion and therefore refused to adjudicate a critical part of petitioner's case, as follows:

iii) the lower court found that the 12,857.143 disputed share issuance which respondents required to gain control of Inofast was "caused . . . without (petitioner's) knowledge or approval" without addressing that factual circumstance on its merits, as a matter of law. The District Court therefore failed to apply well established law by not concluding that the 12,857.143 share stock issuance was illegally performed;

iv) by ignoring the above implicit conclusion of law, the District Court ignored the logical consequence of that necessary conclusion. Because the 18,216.143 shares (without which petitioner would control Inofast) were issued in clear violation of the statute, respondents continued control of Inofast (which has been maintained to date) is in violation of SEC Rule 10b-5. That rule prohibits by law any person . . . to engage in any . . . practice or course of business which operates or would operate as a fraud or deceit upon a person (or corporation), in

connection with the purchase or sale of any security. In the context of the specific facts here, each day respondents must engage in the deception that they hold legitimate (although illegally issued) shares in order to maintain control of Inofast;

v) and by completely ignoring the corporate entity, Inofast, in whose name petitioner also moved for Preliminary Injunction, the District Court failed to address the issue that irreparable harm is established by virtue of the tainting of the elections of Inofast's Board which resulted from respondent's issuance of illegal shares, and which elections will continue to be tainted in the future by the vote of those illegal shares. See *Bank of New York Company, Inc. v. Irving Bank Corporation,* 528 N.Y.S. 2d 482, 484 (Sup. Ct. 1988) ("Irreparable harm if corporate electoral process is tainted").

In *Ruckle v. Roto American Corporation,* 339 F.2d 24 at 25, the same issue was presented to the court as in this case at bar: Does a federal court have jurisdiction under the securities laws to grant a motion for preliminary injunction if an illegal issuance of corporate stock has been alleged (whether prospective or retroactive)? The Court of Appeals for the Second Circuit answered in the affirmative by granting preliminary injunction and remanding the case to the lower court for a prompt trial on the basis of the following conclusion:

"*any* failure of majority of board of directors of corporation to disclose to remaining directors information pertinent to proposed stock issuance, *would constitute fraud upon corporation* within protection of Securities Exchange Act prohibiting employment in connection with sale of security of any deceptive device and rule promulgated under that statute and *court had jurisdiction of action for injunctive relief to prevent such violations.*" (Case summary, emphasis added)

The Ruckle court went further to claim jurisdiction "over actions in which the complaint alleges that a corporation *has been* or may be defrauded into issuing . . . securities . . . ." (339 F.2d at 26). The court therefore made no distinction between retroactive or prospective illegal acts. Both the First Circuit in *Soler, infra.,* (1995), as well as the Second Circuit in *Frankel v. Slotkin,* 984 F.2d 1328 (1993), recently confirmed the *Ruckle* mandate as established federal law. In each case, it was alleged

that the majority shareholder position was usurped by the minority shareholders (who controlled management) through a fraudulent issuance of stock. Under *Ruckle* and *Soler,* petitioner has made a *prima facie* showing that the issuance of a total of 18,216.285 shares was illegally performed. Beyond that initial showing, *the established ongoing exercise of that illegally issued stock by respondents to maintain control of Inofast is a practice or course of business which operates as a fraud upon Inofast* represents an added ground, as a matter of established law, to enjoin the furtherance of that ongoing violation of Rule 10b-5 (3).

To protect the primary public interest of enforcing the law, the court is advised to pay particular attention as to whether an alleged statutory violation is ongoing. When that circumstance has been or can be established, the court has the power in its discretion to enjoin such unlawful conduct.

In the above context, the District Court failed to address the significance of the rule adopted by the Third Circuit Court in *Instant Air Freight Co. v. C.F. Air Freight, Inc.,* 882 F.2d 797, at 803, in which that court held:

> "We have previously held that a statutory provision authorizing preliminary injunctive relief *upon a showing of probable cause to believe that the statute* ***is being violated*** may be considered a substitute for a finding of irreparable harm for purposes of a preliminary injunction issued under Rule 65." (emphasis added)

Petitioner makes a clear showing that the securities law is being continuously violated, which distinguishes this case at bar from those in which only past tense violations were established. As stated by Louis Loss in the Fundamentals of Securities Regulations (1988), page 493, (referring to proxy securities violations), *"since equity will not suffer an offender to enjoy the fruits of his illegal action,* the courts have enjoined the use of proxies obtained through illegal solicitation." (emphasis added). The Third Circuit issued, one year after *Instant Air Freight, infra.,* an opinion in *Natural Resources Defense Counsel, Inc. v. Texaco Refining & Marketing, Inc.,* 906 F.2d 934 at 939 (1990), in which it noted that "the Supreme Court has explicitly rejected the notion that an

injunction follows as a matter of course upon a finding of a statutory violation . . . " (quoting *Town of Hutchinson v. Marsh,* 884 F.2d 648 (2d Cir. 1989). Although the Third Circuit in *Natural Resources* relied on the Supreme Court's decision in *Weinberger v. Romero-Barcelo,* 456 U.S. 305, that court also went on to hold *Supra.* at 937 that under *Weinberger* "the traditional equitable standard in determining whether an injunction (is) appropriate" must be applied. The traditional standard for the granting of an injunction under the securities laws has been expressed by innumerable cases, including *Ruckle v. Roto American Corp., infra.;* see also *J.I. Case Co. v. Borak,* 377 U.S. 426, *Deckert v. Independent Shares Corp.,* 311 U.S. 282, *Kahan v. Rosenstiel,* 424 F.2d 161, 3rd Cir. (1970), *Whitman v. Fuqua,* 549 F. Supp. 315, W.D.Pa. (1982), *General Tire Corporation v. Talley Industries Inc.,* 403 F.2d 159, *Studebaker Corp. v. Gittlin,* 360 F.2d 692, *Mutual Shares Corporation v. Genesco, Inc.,* 384 F.2d 540 (1967).

The securities laws were enacted in the public interest for the protection of investors in securities. Securities represent distinct property rights. Accordingly, *Weinberger, infra.,* instructs that "(a)n injunction should issue only where the intervention of a court of equity is essential in order to protect *property rights* against injuries otherwise irremediable." (emphasis added) Where it might appear in *Natural Resources, infra.,* that the Third Circuit rejected in principle the rule held by the Pennsylvania Supreme Court in *Commonwealth v. Coward,* 414 A.2d 91, 98 (1990) citing *P.U.C. v. Israel,* 356 Pa. 400, 406 - "When the legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable harm." - the facts of *Natural Resources, infra.* are clearly inapposite to those in this case at bar. The illegal issuance of a total of 18,216.285 shares of Inofast stock represents an unlawful distribution of the corporation's property. That violation of property rights, as *Weinberger* instructs, is afforded the remedy of injunctive relief. In *Natural Resources* no such property rights had been violated; in that case the issue was one of environmental protection.

In this case at bar, respondents acquired management control of Inofast by fraudulently issuing 12,857.143 shares of stock. There was no effective payment made to Inofast for those shares (Miller's purchase price for his shares had been "bonused" to him through the corporation). Those shares, at the time they were issued, represented over 30% of the equity ownership of Inofast. Therefore, through an illegal distribution of corporate property, Inofast became partly owned and is being further controlled by respondents on the basis of counterfeit securities.

Petitioner's only redress is in a court of law. Petitioner has made a showing that the disputed stock was indeed illegally issued. Although a trial may eventually restore petitioner's rightful majority status, the opportunities which he as a controlling shareholder of Inofast would have enjoyed in the interim - had that majority status not been usurped - are forever lost and, therefore, irremediable. The established federal securities law supports petitioner's claim for injunctive relief, i.e., that the disputed shares be rescinded as a matter of law. It was therefore the duty of the District Court to grant petitioner's request for injunctive relief.

Because the District Court denied petitioner's valid Motion for injunctive relief, it was in the discretion of the Court of Appeals for the Third Circuit to therefore grant Writ of Mandamus, to compel the District Court to exercise its authority when it was its duty to do so. The Third Circuit Court erred in denying Writ of Mandamus.

CONCLUSION

WHEREFORE, petitioner requests that the Unitied States Supreme Court grant Writ of Mandamus to compel the District Court to grant petitioner's request for preliminary injunctive relief.

Respectfully submitted,

Norman Bardsley,
Petitioner, Pro Se

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN BARDSLEY, *Plaintiff,*	:	
v.	:	No. 95-CV-2287
POWELL, TRACHTMAN, LOGAN, CARRLE & BOWMAN, P.C., *et al.*, *Defendants.*	:	

MEMORANDUM AND ORDER

Joyner, J. February 12, 1996

We address today the motion for a preliminary injunction filed by the plaintiff in this dispute arising from a struggle for control of Inofast Manufacturing, Inc., a Pennsylvania company engaged in the manufacture of fasteners. The plaintiff is Norman Bardsley ("Norman"), a United States citizen domiciled in Austria, and a shareholder and director of Inofast. Norman commenced this action by filing a complaint on April 19, 1995, naming as defendants Powell, Trachtman, Logan, Carrle & Bowman, P.C. ("Powell, Trachtman"), a Montgomery County law firm that served as corporate counsel to Inofast; Joel P. Perilstein and Jonathan K. Hollin, who are members of the Powell, Trachtman firm; Scott Bardsley ("Scott"), who is Norman's twin brother and a shareholder of Inofast; Leigh Bardsley ("Leigh"), who is Scott and Norman's father; and David Miller. Inofast has been named as a nominal defendant.

The gravamen of Norman's complaint is that Scott and the other defendants entered into a series of unlawful transactions for the purpose of divesting Norman of his majority shareholder status. Norman has set forth claims under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act, as well as a number of common law claims. In the instant motion, Norman asks this Court primarily to set aside the elections of Inofast officers and directors conducted during the previous three annual shareholders' meetings and issue an order voiding the disputed

transactions and restoring him to his majority status. A hearing on the motion was conducted on October 5, 1995 and January 3, 1996. The parties have since submitted their proposed findings of fact and conclusions of law. Accordingly, the matter is now ripe for decision.

FINDINGS OF FACT

1. Inofast was incorporated in 1981. Its stock was owned by Norman, who held 18,750 shares; Scott, who owned 11,250 shares; and Mr. Miller, Guy Mallick, Jonathan Price and Klaus Neuber, who collectively held 45,000 shares. Tr., 10/5/95, p. 3.

2. Scott had ten years' experience in the fastener industry prior to Inofast's formation, and was responsible for its day-to-day operation. Norman was a passive investor. Tr., 10/5/95, p. 52; 1/3/96, p. 105.

3. As of 1985, Messrs. Miller, Mallick, Price and Neuber had sold their shares back to Inofast. Thus, Norman's 18,750 shares represented 62.5% of Inofast's issued stock, while Scott's 11,250 shares accounted for the remaining 37.5% of the issued stock. Tr., 1/3/96, p. 43.

4. By 1986, Scott felt the need to bring the expertise of Messrs. Miller and Mallick back into the company. Moreover, Scott was convinced that the only way to achieve this end was to offer them an ownership interest. Tr., 1/3/96, p. 106.

5. Accordingly, the three Bardsleys and Messrs. Miller and Mallick entered into a shareholders' agreement, which provides that the signatories "own all of the issued and outstanding stock of the corporation," in the following percentages:

Norman	35%
Scott	25%
Mr. Mallick	20%
Mr. Miller	10%
Leigh	10%

Plaintiff's Ex. 13.

6. The same five individuals signed shareholders' agreements in 1987 and 1989. The agreements are identical to the 1986 agreement with respect to the stock ownership arrangement. Plaintiff's Exs. 14, 15.

7. The transfer of shares to Leigh and Messrs. Mallick and Miller was to be achieved via gifting from Norman and Scott. Tr., 1/3/96, p. 10. Scott testified that there was a plan "to gift shares over a number of years to the various recipients." Tr., 1/3/96, p. 53.

8. There arose a dispute, however, regarding who would be liable for the gift tax associated with the transactions. Leigh and Messrs. Mallick and Miller indicated that they were unwilling to pay the associated gift tax. Tr., 10/5/95, p. 16.

9. There was never any agreement between Scott and Norman to pay the tax on behalf of the donees. Tr., 10/5/95, p. 16; 1/3/96, p. 53.

10. Mr. Mallick testified that as a result of the gift tax dispute, the shares provided for him in the three shareholders' agreements were never transferred to him. Tr., 1/3/96, p. 10. Likewise, Mr. Miller has indicated that he never received any stock as a result of any of the three shareholders' agreements. Plaintiff's Ex. 36.

11. There is no mention in any of the three shareholders' agreements of either the mechanism by which the transfer of stock would be achieved or the party responsible for paying the gift tax. Indeed, Scott himself testified that no gifting of stock ever occurred. Tr., 1/3/96, p. 48.

12. In August of 1991, Norman returned to the United States and began working with Inofast for the purpose of establishing a subsidiary in Austria. Tr., 10/5/95, p. 17.

13. Norman testified that the company's performance had declined in the years immediately preceding his return. For example, sales had fallen from $3.341 million in 1989 to $2.666 million in 1991. Tr., 10/5/95, pp. 18-19; Plaintiff's Exs. 3, 5, 7.

14. For the year ending September 30, 1991, Inofast incurred a pre-tax net loss of $173,069; and its liabilities exceeded its assets by $243,628. Plaintiff's Ex. 9.

15. Gross revenues fell to $1.897 million in 1994. Plaintiff's Ex. 12.

16. On the other hand, Inofast reduced its debt by $370,000 between the years 1991-1995. Tr., 1/3/96, pp. 89-90.

17. Scott attributed the company's poorer performance to a shift in emphasis from distribution to manufacturing, which he felt was necessary to maintain the long term health of the company. Moreover, Scott pointed to the recent decline in federal spending for national defense to explain the fiscal down trend. Tr., 10/5/95, pp. 19-20; 1/3/96, pp. 114, 148.

18. The relationship between the two brothers began to sour. Norman objected to the leadership Scott was providing for Inofast. He threatened to file a lawsuit, and frequently told Scott that he intended to use his voting power to take control of the company. Tr., 1/3/96, p. 149.

19. Both Scott and Norman became personal guarantors of 50% of Inofast's debt. Tr., 10/5/95, pp. 9-10; 1/3/96, pp. 30-31.

20. In preparation for the 1993 shareholders' meeting, Norman requested Mr. Perilstein to provide him with a list of shareholders who would be entitled to vote. Tr., 10/5/95, p. 24.

21. Mr. Perilstein advised Norman that the shareholders and their respective ownership interests were as follows:

Norman	18,750 shares
Scott	13,392.857 shares
Leigh	5,357 shares
Mr. Miller	5,357.143 shares

Plaintiff's Ex. 54.

22. Mr. Miller did not receive any of his shares until 1993, when he purchased 5,357.143 shares of authorized but unissued stock. In order to facilitate this transaction, Scott unilaterally authorized Inofast to award Mr. Miller a bonus in excess of $21,000 to cover the cost of the shares and the related taxes. Tr., 1/3/96, p. 50.

23. Leigh did not receive his shares until 1992, shares which came to him by way of a gift from the corporation. Tr., 1/3/96, p. 77. This transaction occurred as a result of a meeting attended by only Scott and Leigh. Tr., 1/3/96, p. 57.

24. Prior to the 1993 shareholders' meeting, Scott unilaterally caused the corporation to issue 2,142.857 shares to himself. Tr., 1/3/96, p. 149-50.

25. Thus, Scott caused 12,857 additional shares to be issued without Norman's knowledge or approval. These shares were voted in such a manner as to allow Scott to gain control of the board of directors. Tr., 1/3/96, pp. 149-50.

26. Following the 1993 shareholders' meeting, Scott caused Inofast to issue an additional 5,359 bonus shares to himself, bringing his total to 18,751.857 shares, 1.857 more shares than Norman's interest. This transaction occurred pursuant to a shareholders' meeting held on October 19, 1993, attended by Leigh and Scott. Norman, who was in Austria, had requested an agenda prior to the meeting, but his request went unanswered. Tr., 1/3/96, pp. 38-40.

27. On December 2, 1993, Norman initiated a declaratory judgment action in the Court of Common Pleas of Montgomery County regarding the ownership of Inofast. This suit was subsequently withdrawn. Tr., 10/5/95, p. 66.

28. On June 16, 1994, Norman commenced a second suit in Montgomery County, making claims for (1) injunctive and declaratory relief; (2) violation of fiduciary duties; (3) fraud and misrepresentation; and (4) violation of the Pennsylvania Business Corporation Law. On June 17, the court issued an injunction enjoining the defendants from performing major corporate functions. The parties have complied with this injunction. The Montgomery County action remains pending.

DISCUSSION

In the instant motion, Norman asks this Court for an injunctive order to (1) appoint independent counsel to represent Inofast; (2) set aside the elections of Inofast officers and directors conducted during the previous three annual shareholders' meetings; and (3) order that Inofast conduct its affairs as if Norman controlled 62.5% of the 30,000 outstanding and issued shares. In weighing Norman's request, we are mindful that injunctive relief is an extraordinary remedy that should be granted only in limited circumstances. *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988). Thus, the onus is on the movant to show by sufficient evidence that (1) he is likely to succeed on the merits; (2) he

will suffer irreparable harm if relief is denied; (3) the granting of injunctive relief will not result in greater harm to the adverse party; and (4) the granting of injunctive relief is in the public interest. *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.3d 86, 90-91 (3d Cir. 1992); *Orson, Inc. v. Miramax Film Corp.*, 836 F. Supp. 309, 311 (E.D. Pa. 1993).

Upon review of the evidence presented at the hearing viewed in light of the standard articulated above, we conclude that injunctive relief is unwarranted. Specifically, we find that Norman has failed to convince us that he will suffer irreparable harm if relief is denied.[1] Norman argues that Inofast's fiscal condition has declined precipitously under Scott's stewardship, and that he is at risk in that he has personally guaranteed one half of Inofast's debt. Moreover, he contends that "if provisional action is not taken and taken quickly to address the declining financial situation at Inofast, *there might not be* a Company at all at the conclusion of this litigation for Plaintiff to regain control over. . . ." Plaintiff's Memo. at 7 (emphasis added).

Unfortunately for Norman, this is precisely the type of harm for which there is no injunctive remedy. The cases make clear that injunctive relief is unwarranted where the harm will occur, if at all, only in the indefinite future. Indeed, our Court of Appeals requires that there be a "clear showing of *immediate* irreparable harm" before an injunction may issue. *Campbell Soup,* 977 F.2d at 91 (citation and internal quotation omitted). Moreover, the harm must rise to a level beyond serious and substantial harm; and it must be of a nature so peculiar that money alone cannot compensate for it. *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987) ; *Orson,* 836 F. Supp. at 311.

Here, the harm that animates Norman's request for relief, as he concedes in the emphasized excerpt from his Memorandum quoted above, is speculative, and not immediate. Norman

1. We resolve this motion today solely on the basis of Plaintiff's inability to prove irreparable harm. Thus, we need not address issues such as the validity of the shareholders' agreements, whether Inofast's current counsel should be disqualified, or the legality of the transactions by which Plaintiff lost his majority shareholder status.

has presented evidence of Inofast's financial decline, but not of its imminent collapse. Indeed, Defendants have presented some evidence to suggest that Inofast's financial state is improving. Moreover, the damages that Norman either has suffered or may suffer are not irreparable, but are instead measurable and compensable monetarily. Thus, the harm alleged here is ill-suited for an injunctive remedy. Finally, we note that Norman has failed to present evidence to suggest that Scott's leadership has caused the financial problems at Inofast, or that its fiscal condition would improve if the company's reins were placed in Norman's hands. For these reasons, we conclude that an injunctive remedy here is inappropriate. Accordingly, we enter the following

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1367.[2]

2. Plaintiff has failed to show by sufficient evidence that he will suffer irreparable harm if the instant motion is denied.

3. Accordingly, Plaintiff's Motion for a Preliminary Injunction will be denied.

An appropriate order follows.

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2. Pending before us are two motions to dismiss, which raise jurisdictional issues. Our conclusion here does not address the arguments in favor of dismissal. Thus, we assert jurisdiction over this action today for the sole purpose of disposing of the instant motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN BARDSLEY, *Plaintiff,*	:	
v.	:	No. 95-CV-2287
POWELL, TRACHTMAN, LOGAN, CARRLE & BOWMAN, P.C., *et al.*, *Defendants.*	:	

ORDER

AND NOW, this 12th day of February, 1996, upon consideration of Plaintiff's Motion for a Preliminary Injunction, and the response thereto, and after a hearing on this matter on October 5, 1995 and January 3, 1996, it is hereby ORDERED, for the reasons set forth in the preceding Memorandum, that said Motion is DENIED.

J. Curtis Joyner, J.

GENERAL DOCKET FOR
Third Circuit Court of Appeals

Court of Appeals Docket #: 96-1224 Filed: 3/19/96
Nsuit: 0
Bardsley v. Powell Trachtman
Appeal from: Eastern District of Pennsylvania

Lower court information:

District: 0313-2 : 95-cv-02287
Trial Judge: J. Curtis Joyner, District Judge
Date Filed: **/**/**
Date order/judgment: **/**/**
Date NOA filed: **/**/**

Fee status: paid

Prior cases:
None
Current cases:

	Lead	Member	Start	End
Related:				
	96- 1224	96- 1225	3/19/96	4/12/96

Docket as of June 4, 1996 10:30 am

Proceedings include all events.
96-1224 *Bardsley v. Powell Trachtman*

NORMAN BARDSLEY *Petitioner*	Norman Bardsley [NTC pro] 452 Schoolhouse Lane Philadelphia, PA 19144-4506
v.	
POWELL, TRACHTMAN, LOGAN, CARRLE & BOWMAN *Respondent*	Margaret Mary Maguire FAX 277-9979 610-277-1700 [COR NTC ret] Andrew L. Braunfeld FAX 277-9979 610-277-1700 [COR NTC ret] Masterson, Braunfeld, Maguire & Brown Swede & Airy Streets One Montgomery Plaza, Suite 702 Norristown, PA 19401
JOEL P. PERILSTEIN *Respondent*	Margaret Mary Maguire (See above) [COR NTC ret] Andrew L. Braunfeld (See above) [COR NTC ret]
JONATHAN K. HOLLIN *Respondent*	Margaret Mary Maguire (See above) [COR NTC ret] Andrew L. Braunfeld (See above) [COR NTC ret]

Proceedings include all events.
96-1224 *Bardsley v. Powell Trachtman*

SCOTT E. BARDSLEY *Respondent*	Mark C. Schultz FAX 941-0711 610-941-5400 [COR NTC ret] Sherr, Joffe & Zuckerman 200 Four Falls Corporate Center P.O. Box 800, Suite 400 West Conshohocken, PA 19428-0800
LEIGH BARDSLEY *Respondent*	Mark C. Schultz (See above) [COR NTC ret]
INOFAST MFG INC *Respondent*	Mark C. Schultz (See above) [COR NTC ret]
DAVID E. MILLER *Respondent*	Mark C. Schultz (See above) [COR NTC ret]
J. CURTIS JOYNER	

Docket as of June 4, 1996 10:30 am

Proceedings include all events.
96-1224 *Bardsley v. Powell Trachtman*

NORMAN BARDSLEY,
Petitioner

v.

POWELL, TRACHTMAN, LOGAN, CARRLE & BOWMAN, P.C., et al.

Docket as of June 4, 1996 10:30 am

Proceedings include all events.
96-1224 *Bardsley v. Powell Trachtman*

3/19/96 Original Proceeding Docketed. Notice filed by Norman Bardsley. USCA Receipt No. 35677 and Receipt Date 3/15/96. (ghb) [96-1224]

3/19/96 Submitted on PETITION FOR WRIT OF MANDAMUS. Coram: Greenberg, Cowen, Alito, Circuit Judges. (lrb) [96-1224]

3/25/96 APPEARANCES from Attorneys Margaret M. Maguire & Andrew L. Braunfeld on behalf of Respondents Powell, Trachtman, Logan, Carrle & Bowman, P.C., Joel P. Perilstein & Jonathan K. Hollin, filed. (ghb) [96-1224]

3/25/96 DISCLOSURE STATEMENT on behalf of Respondents Powell, Trachtman, Logan, Carrle & Bowman, P.C., Joel P. Perilstein & Jonathan K. Hollin, filed. (ghb) [96-1224]

4/2/96 FOLLOW UP LETTER to Mark C. Schultz requesting the following documents: **Appearance Form **Disclosure Statement (ghb) [96-1224]

4/10/96 APPEARANCE from Attorney Mark C. Schultz on behalf of Respondents Scott E. Bardsley, Leigh Bardsley, Inofast Manufacturing, Inc. & David E. Miller, filed. (ghb) [96-1224]

4/10/96 DISCLOSURE STATEMENT on behalf of Respondents Scott E. Bardsley, Leigh Bardsley, Inofast Manufacturing, Inc. & David E. Miller, filed. (ghb) [96-1224]

4/12/96 ORDER (Greenberg, Authoring Judge, Cowen, Alito, Circuit Judges) referring the petition for writ of mandamus at 96-1224 to the merits panel to determine if there is appellate jurisdiction. Directing that the petition at 96-1224 be considered with the appeal at 96-1225. The petition for writ of mandamus at 96-1224 is denied, filed. C-84. **SEND TO MERITS PANEL** (lrb) [96-1225]

4/12/96 Certified copy of order sent to Clerk of District Court. (lrb) [96-1224]

Proceedings include all events.
96-1224 *Bardsley v. Powell Trachtman*

4/26/96 Original and 15 copies of document entitled "Motion for Reconsideration of the Denial of Writ of Mandamus, Motion for Reconsideration of the Denial of Appellant's Appeal, Motion for a Temporary Restraining Order" received from appellant pro se. (kot) [96-1224]

4/29/96 NONCOMPLIANCE LETTER requesting compliance for Petition for Rehearing, submitted by Norman Bardsley. Response due in 14 days. (kot) [96-1224]

5/13/96 Complying petition by appellant pro se for rehearing in banc rec'd 5/13/96. (ma) [96-1224]

5/13/96 PETITION by petitioner pro se for rehearing in banc of the denial of petition for writ of mandamus. Certificate of Service dated 4/26/96, filed. (ma) [96-1224]

5/31/96 ORDER (Sloviter, Chief Judge, Becker, Stapleton, Mansmann, Greenberg, Authoring Judge, Scirica, Cowen, Nygaard, Alito, Roth, Lewis, McKee and Sarokin, Circuit Judges) denying petition for rehearing, filed. (ma) [96-1224]

Docket as of June 4, 1996 10:30 am

3rd UNITED STATES CIRCUIT COURT

NORMAN BARDSLEY, *plaintiff,*	:	EASTERN DISTRICT OF PENNSYLVANIA
v.	:	CIVIL ACTION NO. 95-CV-2287
POWELL, TRACHTMAN, LOGAN, CARRLE & BOWMAN P.C., *et al.,* *defendants.*	:	FILED MARCH 15, 1996 Judge Joyner

Writ of Mandamus

The unusual circumstances of this case compels plaintiff to make an extraordinary application for relief. Plaintiff therefore applies to the Court of Appeals for the 3rd U.S. Circuit for a Writ of Mandamus, as derived from the authority of 28 U.S.C. 1651, to grant plaintiff's individual and derivative requests for Preliminary Injunction that were denied by Judge Joyner's Order and Memorandum, dated February 12, 1996. Plaintiff also requests expedited review on Appeal, as derived from Rule 4 of the Appellate Procedure and the authority of 28 U.S.C. 1292, of Judge Joyner's Order and Memorandum, dated February 20, 1996, dismissing plaintiff's individual and derivative Complaint. Plaintiff additionally requests that Judge Joyner be recused, as derived from the authority of 28 U.S.C. 455.

After hearings on plaintiff's preliminary injunction motions were held on October 5, 1995 and January 3, 1996, Judge Joyner issued Findings of Fact that confirmed plaintiff's allegation that Inofast Mfg., Inc., a Pennsylvania corporation, has been illegally governed and controlled since April 26, 1993. That illegal control was acquired and is being maintained on the basis of elections which were tainted by the vote of illegitimate shares. This status quo, as plaintiff additionally alleged, caused and will continue to cause plaintiff and Inofast irreparable harm. Judge Joyner denied plaintiff's preliminary injunction motion on the exclusive grounds that irreparable harm had not been shown. Judge Joyner thereby denied plaintiff's prayer for relief to rescind the shares that he had other-

wise determined, by the weight of his very Findings, had been improperly issued. Judge Joyner's decision permits the continued mismanagement of Inofast's corporate affairs by directors who *but for the illegal and tainted elections held* would not be in office, by letting that illegal status quo to go unabated forward.

Notwithstanding the Court's factual Findings in substantiation of the merits of plaintiff's factual allegations, Judge Joyner subsequently dismissed plaintiff's Complaint by his Order and Memorandum, dated February 20, 1996, without allowing plaintiff leave to amend. Plaintiff's individual and derivative federal claims address issues of the integrity of a proper and legal democratic process in corporate law that he has shown had been and will continue to be violated. As will be shown, Judge Joyner failed to exercise the Court's authority when he had a duty to do so.

Judge Joyner denied plaintiff's prayer for relief by ignoring the fundamentally obvious factual nature of plaintiff's showing of probable cause that substantive federal statutes *are being* violated and that irreparable harm is being suffered through a continuing tainted corporate electoral process. Judge Joyner denied federal jurisdiction, not only by ignoring material facts of record but by ignoring the substantive law in the context those facts were pled. Additionally, Judge Joyner's opinion reflects renderings and omissions of fact presented in a light most *unfavorable* to plaintiff. The numerous examples of Judge Joyner's abuse of discretion, factual error and error as a matter of law give the distinct appearance, in their overwhelming entirety, of an inappropriate bias or prejudice against plaintiff. For those reasons, plaintiff requests that Judge Joyner be recused from any further proceedings in this case.

Statement of Fact, as construed from Judge Joyner's Findings of Fact ("Findings"), Memorandum and Order dated February 12, 1996:

1) The effectuation of the shareholders' agreement was contingent to a transfer of shares which was to occur via a gifting from Norman and Scott to Leigh and Mssrs. Malick and Miller.

a) Judge Joyner observed that the shareholders' agreement provided that the signatories would "own all the *issued and outstanding* stock of the corporation". (Findings #5)

b) Because at all relevant times the only legally *issued and outstanding* stock were the 30,000 shares owned by Scott and Norman (Finding #3), to effectuate the shareholders' agreement it was agreed upon that a transfer of shares to Leigh and Mssrs. Malick and Miller was to be achieved via a gifting from Norman and Scott. (Finding #7)

2) The effectuation of the shareholders' agreement as agreed upon did not occur.

a) Judge Joyner confirmed that Mssrs. Malick and Miller never received any shares. (Finding #10)

b) Judge Joyner also confirmed that Scott testified that no gifting ever occurred. (Finding #11)

c) Plaintiff also testified that no gifting had occurred. (Hearing transcript, Oct. 5, 1995)

3) A series of stock issuances, totalling 12,857 (sic. .143) shares was caused by Scott without Norman's knowledge or approval. (Findings ## 22, 23, 24 and 25)

4) An additional 5,359 shares were bonused to Scott. (Finding # 26) In his Memorandum dated February 20, 1996, Judge Joyner further confirmed that:,

a) "This transaction occurred without Norman's knowledge or approval." (page 5, Court's Slip Opinion)

b) "It was therefore not until the 1994 shareholders' meeting convened that Mr. Perilstein informed Norman that Scott had received the 5,359 bonus shares." (therefore, as of April 25, 1994, page 6, Court's Slip Opinion)

Factual Conclusion:

5) It can be logically deduced that none of the stock transactions listed under Judge Joyner's Findings, i.e., #22, 5,357.143 *unissued* shares to Miller, #23 Leigh's shares, #24, 2,142.857 shares to Scott (Scott was an intended donor, not a donee), # 26, the additional 5,359 bonus shares to Scott had been or could have been authorized by the shareholders, agreement. Judge Joyner significantly omitted the above con-

clusional Finding although the factual record immutably supports it (See the transcripts for the Oct. 5, 1995 and Jan. 3, 1996 Hearings). Judge Joyner therefore neglects to resolve the central issue of plaintiff's 29(b) securities claim, i.e., that the shareholders' agreement could not have legally authorized the disputed 12,857.143 corporate share issuance. It was error for Judge Joyner not to resolve the merits of plaintiff's motions as a matter of law, i.e. — Were the disputed transactions illegally performed? — although an affirmative conclusion is supported by the following Findings and circumstances:

a). "There is no mention in any of the three shareholders' agreements of . . . the mechanism by which the transfer of stock would be achieved . . ." (Findings #11)

b) "The transfer of shares to Leigh and Mssrs. Malick and Miller was to be achieved via gifting from Norman to Scott" - (Finding #7) - therefore, not via a corporate issuance of stock.

c) Only *issued and outstanding* stock was to be owned by the designated signatories.

d) A corporate issuance of stock that is tantamount to a gifting of shares is in violation of the statute.

Issues, matters of law and argument:

6) Because the shareholders' agreement could not possibly provide legal authorization for the above stock transactions, those transactions required separate approval by the board of directors, as a matter of law. The disputed transactions, each performed by way of a corporate share issuance *without full board disclosure,* constituted fraud. This applies to each of the 4 transactions scrutinized under Findings ## 22, 23, 24 and 26.

a) *"As a matter of authority and principle, the issuance by a corporation of its own shares is a "sale" to which the anti-fraud policy expressed in the federal securities laws extends."* (*Ruckle v. Roto American Corp.,* cited as 339 F.2d24 at 27)

b) *"Does the failure or refusal of a majority of a board of directors to disclose to the remaining directors infor-*

mation pertinent to a proposed stock issuance constitute a "fraud" upon the corporation within the meaning of the statute? We answer . . . in the affirmative." (*Ruckle v. Roto* at 27)

c) The above referenced transactions, properly framed under *Ruckle* as fraud upon Inofast, so qualify under Rule 10b-5 both as:

(1) a scheme to defraud, and

(3) a practice or course of business which operates or would operate as a fraud upon the corporation, in connection with the purchase or sale of any security.

d) a scheme in connection with the illegal issuance of 12,857.143 shares was perpetrated through the acquisition of control of Inofast by way of the voting of disputed shares at the April 26, 1993 annual shareholders' meeting. (court's Slip Opinion, Feb 20, 1996 at page 14)

e) the above referenced practice or course of business has continued since April 26, 1993, and at each subsequent shareholders' annual meeting whereby the initially disputed 12,857.143 shares were voted, in addition to the disputed 5,359 bonus shares later issued, on April 25, 1994 and April 24, 1995, so as to **maintain** control of Inofast.

f) that illegal practice or course of business will continue until defendants are enjoined from voting the illegally issued stock.

7) Because the transactions referenced under 6 above were effectuated by way of the illegal performance of the shareholders' agreement (*the contract*), they also qualify as violations of 29(b), *in continuance of any relationship or practice in violation of 10b-5.*

8) The transactions referenced under 6 above also represent common law fraud violations, as well as violations of the Penna. BCL and the Penna. Securities Law.

9) In the discussion of defendant's statute of limitations challenge, Judge Joyner did not even address the timeliness of the separate alleged 5,359 bonus share issuance violation. That transaction was secretly affected in October 1993, of which plaintiff was first informed as of April 25, 1994, at which time that violation, as a matter of law, first accrued. In his Memorandum in Opposition to Defendants' Motions to Dismiss,

plaintiff already observed: *"This suit having been commenced on April 19, 1995, there is no question, and defendants have not raised any, that the §§10b and 29(b) claims challenging this second transaction are timely before this Court."* By denying *all* plaintiff's security fraud claims, collectively, as time barred, Judge Joyner did not state that the 5,359 separate alleged bonus share violation was untenable as a 10(b) or 10b-5 cause of action. There can therefore be no question that Judge Joyner was in error by dismissing plaintiff's 5,359 bonus share securities violation claim.

10) Plaintiff concededly knew or should have known of the direct 10b-5 injury as of April 26, 1993, i.e.; such a claim would have found its exclusive basis on the grounds that 12,857.143 shares had been issued without his knowledge or approval, as a majority shareholder and a director of the board. But plaintiff brought his securities claim under §29(b) of the securities act which provides in pertinent part that *"every contract made . . . **the performance of which** involves a violation of . . . any provision of this chapter or any rule or regulation thereunder, shall be void . . ."* On that basis, plaintiff alleged that the secret and improper invocation of the shareholders' agreement authorizing the issuance of 12,857.143 shares was in violation of the Rules 10(b) and l0b-5, making that "contract" void. To have a basis for his claim, plaintiff would have to know, or have at least reasonable grounds to know, that what he alleges *actually* occurred. He makes himself otherwise liable for Rule 11 sanctions.

Although Judge Joyner made specific reference to plaintiff's statement that *"he* (plaintiff) *assumed that the 1989 Shareholders' Agreement had been somehow clandestinely resurrected and invoked bv Defendants . . . to justify and authorize the disputed shares' issuance",* that was not a **fact** *known* to plaintiff as of April 26, 1993 upon which plaintiff could base his later §29(b) claim. To the contrary, the lack of such a factual basis for his claim was the reason why plaintiff initiated a declaratory action in December of 1993, **in which he took the position that the shareholders' agreement was null and void.**

Plaintiff made a due diligent attempt to ascertain the underlying facts relating to the 12,857.143 share issuance in

dispute. Neither did plaintiff's repeated information requests nor did the declaratory action succeed in evoking the information he required.

Indeed, defendants' conduct during the pendency of the initial suit in Montgomery County negated plaintiff's assumption, following his learning on April 25, 1994 that an additional 5,359 bonus shares had been secretly issued to Scott. The issuance of those bonus shares was in obvious breach of the shareholders' agreement. Therefore, as of April 25, 1994, it became *unreasonable* for plaintiff to believe that the shareholders' agreement had been secretly invoked. That was the reason why plaintiff voluntarily discontinued his initial suit and replaced it with the action presently pending (as noted under Footnote 1 of plaintiff's Memorandum of Law in Support of Petition for Special and Preliminary Injunction, page 2). See also *Trecker v. Scag,* 679 F.2d 703, under-Footnote 7 at 707, *" . . . there could certainly be situations in which a defendant's conduct would estop him to claim the benefits of a statute of limitations."*

Clearly the facts do not support Judge Joyner's finding that plaintiff *knew or should have known* that the clandestine invocation of the shareholders' agreement had been used to authorize the disputed 12,857.143 share issuance until he was first so informed, as of August 22, 1994. Judge Joyner's factual Finding is therefore in error.

11) Nor did Judge Joyner consider plaintiff's fraudulent concealment pleadings and their significance with regard to equitable tolling or equitable estoppel doctrines.

See the 1993 Supplement of the FUNDAMENTALS OF SECURITIES REGULATION, Louis Loss, Joel Seligman, page 378:

"(3) Presumably ***Lampf did not overrule the tolling principle;*** *at most it imposed a three-year limit on the allowable discovery."* (emphasis added) See also *Manning v. Maloney,* 787 F.Supp. 433 M.D.Pa. (after *Lampf*) at 436:

"It is better to say that equitable tolling and related doctrines do not extend the period of limitations by more than the two year grace period §13 allows." And further, from page 436: *"The 'discovery rule, is such an exception, and arises from the*

inability of the injured, *despite the exercise of due diligence, to know the injury* ***or its cause*** *. . ." (emphasis added)*

See also *Tregenza v. Great American Communications Co.*, 12 F. 3d 717 at 721 (7th Cir. 1993):

"Lampf holds, it is true, that when knowledge or notice is required to start the statute of limitations running, there is no room for equitable tolling . . . But there may be room in such a case for equitable estoppel . . . (t)*he plaintiff might have the required information — actual knowledge of the violation or inquiry notice, as the case may be — yet be thwarted from suing in time by misrepresentations or other actions by defendant . . ."*

See also *Engl v. Berg*, 511 F. Supp. 1146 at 1151 (E. D. PA):

"As such the fraudulent concealment allegation raises genuine issues of material fact, ***rendering resolution through summary judgement inappropriate."*** (emphasis added)

Plaintiff's securities' fraud claim addresses a fundamental issue of the security law, i.e., that complete disclosure of all material facts must be performed where a duty to disclose exists. A duty existed for defendants to inform plaintiff of all material facts relating to the issuance of stock performed by them. Defendants breached that duty. That breach represents *fraudulent concealment.* There is nothing in evidence indicating that defendants at *any time before August 22, 1994* informed plaintiff that the shareholders' agreement had been used to authorize the issuance of the 12,857.143 disputed shares. Nor does the alternative argument hold water that corporate management forgot to memorialize the authorization of such a significant corporate act *in writing,* and or forgot to so inform plaintiff, who at that time was a director of the board and the majority shareholder of record.

Judge Joyner was in clear error by declaring plaintiff's 12,857.143 share issuance securities violation claim time barred, despite clear issues of fraudulent concealment and defendants' deception that, as a matter of law, equitably extend the discovery period under *Lampf.*

12) Judge Joyner also ignored the August 22, 1994 mailing by Mr. Hollin. As plaintiff alleged, that mailing was a mis-

representation of material fact that qualifies both as a securities violation as well as mail fraud. The August 22, 1994 letter stated two things: first, it declared that the shareholders' agreement authorized the issuance of the 12,857.143 disputed shares (the core of the fraudulent scheme); and second, it declared the Malick Deferred Compensation Agreement to have been performed in compliance with the shareholders' agreement. The record has proven that the invocation of the shareholders' agreement was a fraud upon Inofast and plaintiff. The record has also proven that Malick's "shareholdings" were "extinguished" in breach of the agreement, even before that agreement was purportedly effectuated. Indeed, Malick's deferred compensation agreement, as it was later claimed to have been executed, represented tax fraud.

a) The above misrepresentations were made to deceive in connection with the sale of a security, to *disguise* the illegitimacy of an actual sale (12,857.143 shares) and a duped "sale" (the "repurchase" of Malick's 10,714.285 phantom "shares").

b) The above fraudulent misrepresentations were made with the purpose that plaintiff, as a member of the board, should rely on them. As those representations were made by "corporate counsel", they were also intended for the corporation to rely on.

c) The above misrepresentations were an attempt to cover-up the illegal scheme to defraud the corporation and plaintiff, to facilitate its furtherance. *"Attempting to hide one's involvement in a scheme after it has been exposed in order to limit liability should not be confused with* ***concealing the scheme itself in furtherance of its perpetration. While the later may be a predicate act within the meaning of RICO*** *the former is not. Philadelphia Reserve Supply Co. v. Nowalk & Assocs.,* Civil Action No. 91-0449, 1992 U.S.Dist. LEXIS 12745, E.D.Pa. (emphasis added)

d) The above referenced mailing qualifies as 10b-5 fraud under (2):

> *"it shall be illegal to make any untrue statement of a material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading."*

e) As such, the above referenced mailing qualifies as a violation of the mail fraud statute. It is also an additional predicate act of RICO.

f) Judge Joyner abused his discretion by ignoring the above mailing in both his security law as well as RICO analysis. That omission was clearly in error.

13) To qualify as a predicate act RICO violation, a securities violation is not precluded by the applicable securities law statute of limitations. *"If a civil RICO claim is established, it is clear under Malley-Duff that the Clayton four year period rather than the one/three-year period of the Securities Acts will be applicable even after Lampf."* (page 853, SECURITIES LAW HANDBOOK, 1996 Edition, Bloomenthal, published by Holme, Roberts & Owen) Therefore, the initial disputed 12,857.143 share issuance securities law violation - should it *arguendo* be time barred under Lampf (which plaintiff disputes) - does not eliminate it as a predicate violation of RICO.

As already stated under 6 above, the series of transactions that promulgated the fraudulent issuance of 12,857.143 shares of Inofast stock therefore qualify as security law violation predicate acts of RICO and cannot be time barred under the applicable 4 year statute of limitations. Those predicate RICO acts therefore represent "live violations." and not "dead ones", as Judge Joyner would seem to suggest by barring plaintiff's 10b-5 cause of action under *Lampf. "In order to establish the requisite continuity under the open-ended framework* (of RICO) - quoting Judge Joyner (Slip Opinion, Feb. 20, 1996, page 15) - (t)*he allegations must therefore amount to or pose the threat of continuing criminal activity."* The very nature of the illegal 12,8,57.143 share issuance compels the logical conclusion that any rights thereto attached, if used or maintained, also represent illegal acts, for example, the voting of those illegal shares.

Judge Joyner's conclusion that "(he) *cannot reasonably envision continued unlawful behavior"* flies in the face of reason. Each and every time defendants voted their illegally begotten shares, they were performing a securities violation by deploying a device to defraud and by engaging in an act which

operates as a fraud. What could be more inherently fraudulent or fundamentally undemocratic than to exercise voting rights that don't and cannot lawfully exist? Those same acts also represent predicate RICO violations. To continue their control of Inofast, defendants must vote their illegal stock at the upcoming April 1996 annual meeting. Not only does a threat of illegal behavior exist, defendants are compelled to continue their pattern of racketeering behavior to **maintain** control of Inofast.

14) The above referenced conduct clearly qualifies as a pattern of racketeering activity as per §§1962 (b) and (c).

a) Judge Joyner neglected to address plaintiff's §1962(b) claim. Under §1962(b), it is illegal to illegally acquire and maintain control of a legitimate enterprise through related and continuous predicate acts. Judge Joyner *defacto* confirms that control of Inofast was illegally acquired. Common sense dictates that illegally acquired control - not having been relinquished - is being **maintained.** Therefore, a violation of §1962(b) is, by its very nature, ongoing. Why would defendants go to the effort of illegally acquiring control with no intent of maintaining that control? The *maintenance* of illegal control represents the essential purpose of a §1962(b) violation.

b) Under §1962(c), it is illegal to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity. Clearly, Inofast is being governed through conduct that was predicated on fraudulent elections, in violation of 10b-5 (1) and (3), RICO and a number of state law statutes. That conduct satisfies the §1962(c) requirement, which Judge Joyner failed to properly interpret.

15) RICO predicate acts accrue from the date plaintiff knew or should have known when each predicate violation occurred (*Keystone Ins. Co. v. Houghton,* 863 F.2d 1125, 3rd Cir). Therefore, the 5,359 bonus stock issuance violation predicate act did not accrue when it secretly occurred, in October 1993 (when Judge Joyner, in his opinion, apparently "pegs" it), but as of April, 25, 1994, when plaintiff was first so informed. Between the accrual dates of the 12,857.143 share violation RICO predicate act of April 21, 1993, and the 5,359

bonus share violation RICO predicate act of April 25, 1994 over one year time transpired, not 7 to 8 months, as Judge Joyner found. Judge Joyner also completely overlooked the fraudulent August 22, 1994 mailing, which arguably extends the scheme another 4 months, that, notwithstanding all the other predicate acts Judge Joyner has failed to notice. Judge Joyner's factual findings with regard to his analysis of the closed ended continuity prong of RICO were erroneous and or incomplete.

Judge Joyner's analysis that the scheme ended when defendants gained control is inconsistent with his further observation that "(a)*rguably, we might conclude that the scheme extended through October of 1993.*" How could a scheme that accordingly ended in April 1993 even "*arguably*" extend until October 1993?

16) Judge Joyner also neglected to address plaintiff's §1962(d) RICO conspiracy claim. A recent 3rd Circuit case, *U.S. v. Antar,* 53 F.3d 568 at 583, citing *United States v. Eisen,* 974 F.2d 246, 269 (2d Cir.1992), offers the following compellingly analogous examples of RICO conspiracy violations that are ongoing:

"*For instance, the Court of Appeals for the Second Circuit recently concluded that a defendant-attorney had not withdrawn from a conspiracy when, although he resigned from the enterprise law firm, he " 'continued to be entitled to a percentage of the recovery on all cases he tried including those giving rise to his pre-*(resignation) *racketeering acts.' "* And further: (15) "*Applying these principles to this case, it is clear that Mitchell has not established a prima facie case of withdrawal. While he resigned from Crazy Eddie, he did not sever all his ties with the enterprise. To the contrary, Mitchell concedes that* ***he retained stock in the enterprise*** *until September 16, 1987, a date within the five-year limitations period. Therefore, Mitchell* ***continued to receive the fruits of the fraud.***" (emphasis added)

Applying the above principles to this case, all the defendants accused of owning illegally begotten shares have retained their shares. Until such time when that stock should be declared invalid or is otherwise relinquished, defendants will clearly *continue* to benefit from the fruit of their fraud.

U.S. v. Antar provides a most explicit confirmation, as a matter of law, that the RICO scheme in this case is ongoing and *continuous.*

Additionally, under the conspiracy theory of RICO, Judge Joyner's rendition of the following facts is clearly erroneous: *"It was not until Norman threatened to upset the status quo, therefore, that the defendants had any reason to plot Norman's ouster. Thus, we must conclude that the defendants commenced implementation of the alleged scheme in the Spring of 1993."* The "vaccination letter" from Scott to Mr. Perilstein was sent on August 8, 1992; that is when the plot clearly hatched, nearly 8 months before the "Spring of 1993". Nor did *plaintiff* threaten to upset the status quo, he simply expressed his intent to vote his 18,750 shares, fully and rightfully expecting that only 30,000 shares could be legally voted. *Defendants,* not plaintiff, upset the legal status quo.

Finally, under a conspiracy theory, defendant attorneys entered into agreements with Scott to defraud Inofast and plaintiff. Those agreements are in writing and on record, i.e., the above referenced "vaccination letter" (P-53, pages 140 through 142 of the January 3, 1996 transcript) and the Powell Trachtman Law firm Memorandum of June 1993 "the smoking gun" (P-56, page 144 of the January 3, 1996 transcript) which outlined the conspiracy's intent and which goal was accomplished.

The omission of an §1962(d) analysis in Judge Joyner's opinion was therefore error.

17) Judge Joyner denied plaintiff's preliminary injunction motion, not on lacking merits but solely on the erroneous basis that plaintiff had not made an adequate showing of irreparable harm. The following cases - in addition to those cases already cited in plaintiff's request for reconsideration which Judge Joyner also denied by his Order of March 12, 1996 - contravert Judge Joyner's denial of plaintiff's motion for preliminary injunction on the facts proven at the two injunction hearings, as a matter of law:

See *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797 at 803 (3rd Cir. 1989), which states the following, citing *Gov. of V.I. Dept of Conservation v. V.I. Paving*, 714 F.2d 283 (3rd Cir. 1983):

"We have previously held that a statutory provision authorizing preliminary injunctive relief upon a showing of probable cause to believe that the statute is being violated may be considered a ***substitute for a finding of irreparable harm*** *. . ."*

See also *SEC v. Management Dynamics, Inc.*, 515 F.2d 801 at 805, as well as *U.S. Postal Service v. Beamish*, 406 F.2d 804 at 806.

See also *Treco, Inc. v. Land of Lincoln Sav. and Loan*, 572 F.Supp. 1447 at 1450:

"By refusing to grant plaintiff's written demand to call a special shareholders' meeting . . . there is substantial likelihood that defendants have violated (the statute) *. . . the Court finds that plaintiffs would be irreparably harmed if a preliminary injunction were denied because plaintiff would be unnecessarily frustrated in their attempt to obtain representation on Lincoln's Board of Directors at the October 26, 1983 annual meeting."*

Clearly plaintiff has demonstrated probable cause that the federal security laws, RICO and substantive Penna. state statutes are being violated. Judge Joyner has *defacto* confirmed so much - albeit - amazingly, without so concluding. The relief plaintiff derivatively requested was in the furtherance of a public interest, i.e., that the law be obeyed. Judge Joyner made no attempt to rebutt the merits of plaintiff's claim, nor can any argument be made by defendants that the granting of a PI would have harmed them, except that, *"as here, the only consequence of an injunction is that the defendant must effect a compliance with the statute* ***which he ought to have done before."*** *Studebaker Corp. v. Gittlin*, 360 F.2d 692 at 698, Judge Friendly, 2d Circuit.

18) Judge Joyner's denial of plaintiff's motion to disqualify counsel as moot was also an abuse of his discretion. Plaintiff's Motion to Disqualify Counsel was made on the basis that Mr. Schultz is currently representing the alleged defrauded corporation and simultaneously those individuals

who have allegedly defrauded it. That circumstance does not just imply potential adversity of interest; adversity of interest already exists.

See *Maritrans v. Pepper,* 529 Pa. 241, at 255:

"Where an attorney so far forgets, or ignores, his professional duty as to engage his service to one whose interests are necessarily in conflict with those of his client . . . there is no doubt of the power of the court to enter and enforce an order restraining the attorney from so acting . . . . Accordingly, the trial court's preliminary injunction was a proper mechanism to abate an unlawful and actionable breach of fiduciary duties to Maritrans ***where the facts support such a conclusion."*** (emphasis added)

19) Judge Joyner's observation — that plaintiff *"fails to explain the relevance of his assertion that Scott intended to ignore the 1989 agreement from the very beginning."* (Court's Slip Opinion, Feb. 20, 1996, page 14) — ignores Federal Rule 9(b), whereby "(a) *party may allege . . . intent . . . generally."* (emphasis added) Most certainly plaintiff has alleged with particularity, and the hearings have so confirmed, widespread fraudulent conduct by defendants.

A summary of reasons for Plaintiff's request for Judge Joyner's recusal.

20) The issues presented to the Court for disposition by plaintiff in his preliminary injunction motion were fundamentally simple:

i) Were the disputed corporate stock issuance transactions, as plaintiff alleged, illegally performed?

ii) If those transactions were illegally performed, does the continued execution of rights attached to those illegitimate shares represent an ongoing violation of the statute that plaintiff has also alleged?

iii) Should that alleged ongoing scheme, as a matter law, be enjoined?

Because Judge Joyner did not resolve the above issues, it was *highly inappropriate* for him to dispose of all other issues on a motion to dismiss. See *In Re School Asbestos Litigation,* 977 F.2d 764 at 793 (3rd. Cir, 1992) : *"But whereas it is inevi-*

table that judges will make mistakes from time to time . . . the error of refusing to rule on the merits . . . is entirely avoidable."

To reiterate the circumstances of this case:

a) Judge Joyner presided over two days of hearings during which overwhelming evidence was presented to substantiate the merits of plaintiff's allegations. Judge Joyner's Findings of Fact confirm that the disputed stock issuances were in violation of substantive federal and state statutes, as a matter of law. But Judge Joyner denied plaintiff's claim that the alleged illegal scheme was ongoing on the grounds that (the Court) *cannot reasonably envision continued unlawful behavior."* Judge Joyner's denial of plaintiff's prayer for preliminary relief was therefore based on his erroneous conclusion that there was no *probable cause to believe that the statute* ***is being violated,*** a position which is clearly not supported by the facts in this case. Judge Joyner's further conclusion that no irreparable harm had been shown confuses the factual issues of this case as a matter of law. The case law citations made under (17) above address the simple logical conclusion that *any* ongoing violation of the statute represents "irreparable harm", which can not be countenanced by the law. Plaintiff has placed the Court on notice that an illegal status quo exists; he has proven its existence on merits and; he has requested of the Court to reinstate the legal status quo. Judge Joyner has not fulfilled the Court's duty to so act.

b) Judge Joyner's denial of federal court jurisdiction represented an even more serious error. Judge Joyner based his above decision on the premise that plaintiff's federal security claims were time barred. That conclusion - as plaintiff has already pointed out - was not only factually incorrect but flawed, as a matter of law. Judge Joyner places the rules of law on their head by making plaintiff suffer the consequences of defendants' non-disclosure violations, by in effect he is saying, defendants may use their additional concealment fraud to claim the benefits of the statute of limitations. That position is not only unsupportable; it is outrageous. Plaintiff cannot be held responsible for not discovering facts that defendants - who were under a fiduciary duty to so inform him and the corporation - have steadfastly refused him. Judge Joyner has

therefore denied plaintiff his right to a federal court forum on the grounds of plaintiff's purported *culpable* ignorance of the facts, the very basis of which was caused by an additional and completely independent federal cause of action under the security laws, namely, **fraudulent concealment.**

c) Judge Joyner made his Finding under (25) of his February 12, 1996 Memorandum that " . . . *Scott caused 12,857 (sic. .453) additional shares to be issued* ***without Norman's knowledge or approval.***" (emphasis added) That Finding establishes a violation of the most fundamental of federal security rules. That rule demands full disclosure, by those fiduciaries who effectuate an issuance of stock (defendants in this case) to all individuals (plaintiff, as the majority shareholder of record, in particular, and the corporation) who those fiduciaries have a duty to so inform, of all material facts required to facilitate adequate deliberation of those transactions ***before*** such transactions occur. Notwithstanding any finding on the validity of the shareholders' agreement, the mere fact that defendants refused to state that the shareholders' agreement was going to be invoked to authorize the disputed shares issued ***before*** those transactions occurred was in violation of the statute. How could plaintiff have possibly known the above necessary information, at a time when he had a statutory right to be so informed? By adding on another layer of non-disclosure fraud to their scheme, defendants first then succeeded in effectuating the illegal status quo that Judge Joyner is so amazingly hesitant to disturb. The irony of Judge Joyner's decision is resounding.

d) Judge Joyner's denial of plaintiff's Motion to Disqualify Counsel ignored the premise under which it was made. The above disqualification motion was made as a request for preliminary relief. One of the most fundamental legal rights is a person's right to impartial counsel. That right extends of course also to a legal entity, i.e., Inofast Mfg., Inc. Plaintiff has brought his disqualification motion, derivatively, on the grounds that Mr. Schultz - as explained under (18) above - was in a conflict of interest and that he, therefore, could not adequately represent Inofast. The fact that Mr. Schultz continues as Inofast's counsel in a clear conflict of interest represents

irreparable harm. Judge Joyner's denial to equitably dispose of plaintiff's disqualification motion, without any deliberation whatsoever, was a significant error.

e) Plaintiff's request for Judge Joyner's recusal is based on plaintiff's common sense observation, as supported by the above, that Judge Joyner has demonstrated an obvious propensity to avoid and ignore the fundamental issues presented to the Court in this case. Plaintiff's recusal request is the logical consequence of that observation, to foreclose Judge Joyner any potential future dealings with this case with which he, most "decisively", was not willing to deal in the first place.

Reasons for expedited review under Writ of Mandamus:

21) After over two years of litigation, plaintiff has not even attained the preliminary *equitable* relief which he justifiably believes he deserves. Nor, in fact, has even the central question been disposed of: whether or not the transactions plaintiff has disputed since April 26, 1993 were illegally performed. This, although Judge Joyner was given all the ingredients required to expose the alleged scheme and put an end to its furtherance.

a) Plaintiff's efforts to attain judicial relief for the harm he and the corporation have incurred, and to enjoin defendants from causing further harm, have caused him in excess of $200,000 in expenses and attorney fees. It is no small matter for a private individual to finance such immense expenditures for years without any palpable results. This case is a prime example of a legal system gone awry which literally threatens a private litigant, who has legitimate equitable and damage claims for harm already done him, with the additional harm of potential bankruptcy through a litigation process that is intended to protect those very interests. Could it be that the judicial process of vindicating harm can be in of itself potentially harmful to one's financial health? If such danger exists, it is time that the attorney general make such an appropriate warning.

b) Lastly, Judge Joyner refers plaintiff back to the State Court forum of Montgomery County. It must be noted

that plaintiff had already made an identical prayer for relief, based on state law, which has been heretofor ignored by Judge Lawrence, the presiding Judge in the Montgomery County Court (Motions for Preliminary and Permanent Injunction of June, 1994 and February, 1995). Plaintiff, therefore, has no other reasonable alternative for relief but to request that his federal claims be disposed of under federal jurisdiction.

22) Due to the above circumstances, plaintiff believes that his right to judicial relief has been neglected and prejudiced. Plaintiff's Writ of Mandamus for immediate review of his claims for injunctive relief, as well as his requests for Appeal as well as his request for recusal of Judge Joyner, are therefore premised on his belief that the review Court must also protect the public interest of confidence in the judicial process which in this case, he believes, there is an evident need to restore.

See *SEC v. Antar,* (Slip Opinion No. 95-5283, 3rd Circuit, dated Nov. 28, 1995, at page 8): *"Because we seek to protect the public's confidence in the judiciary, our inquiry focuses not on whether the judge actually harbored subjective bias, but rather on whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias."*

It is indeed plaintiff's contention that the record of this case supports the appearance of Judge Joyner's prejudice and bias that motivated him to request Judge Joyner's recusal under Writ of Mandamus.

See also *Texaco, Inc. V. Chandler,* 354 F.2d 655 at 657: *"Upon an adequate showing, this court has held that it has the "power and inescapable duty", whether under the all-writs statute, 28 U.S.C. 1651, or under its inherent powers of appellate jurisdiction, "to effectuate what seems to us to be the manifest ends of justice."*

Norman Bardsley

Plaintiff, Pro se

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

March 19, 1996

No. 96-1224

NORMAN BARDSLEY, *Petitioner*

v.

POWELL, TRACHTMAN, LOGAN, CARRLE and BOWMAN, P.C., et al.
(EDPA D.C. No. 95-cv-02287 (JCJ))

Present: GREENBERG, COHEN and ALITO, *Circuit Judges.*

1) Petition for Writ of Mandamus.

Lenore R. Benoit 597-1092
Deputy Clerk

ORDER

The foregoing petition is referred to the merits panel to determine if there is appellate jurisdiction. The petition should be considered forth 96-1225. The petition for mandamus is denied.

By the Court,

Circuit Judge

Dated: April 12, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Norman Bardsley, *petitioner, appellant,*	:	
v.	:	
Powell, Trachtman, Logan, Carrle & Bowman, P.C., Joel P. Perilstein, Jonathan K. Hollin, Scott E. Bardsley, Leigh Bardsley, David E. Miller and Inofast Manufacturing, Inc., *appellees.*	:	No. 96-1224

Motion for Rehearing In Banc of the Denial of Petition for Writ of Mandamus

The issues before the Court on Petition for Writ of Mandamus are intertwined with issues relating to petitioner's notice of appeal of the two District Court Opinions and Orders, dated February 12, 1996 and February 20, 1996, although a briefing schedule for those appeals has yet to be designated. Petitioner's request for extraordinary relief, by way of Writ of Mandamus, was made to compel the District Court to exercise its authority which it did not perform, where a clear duty to do so was given. Petitioner additionally requested disqualification of the acting Judge on the ground of pervasive bias.

Petitioner initiated his federal action No. CV 95-2287 on April 19, 1995 with a motion for a temporary restraining order requesting the court to enjoin the then upcoming Annual Shareholders' Meeting of April 24, 1995 until a preliminary injunction hearing could be held. The reason for that motion was to restrain defendants from voting 18,216.143 shares that petitioner alleged had been illegally issued (so as to maintain their unlawful control of Inofast), to prevent that illegal scheme from formally entering its third year. The presiding Emergency Judge, Bartle, denied the above motion without prejudice, reserving the matter for the assigned District Court

Judge, Joyner. Judge Joyner subsequently presided over two preliminary injunction hearings, on October 5, 1995 and January 3, 1996.

The above hearings factually established that defendant respondents' effectuation of the initial corporate issuance of 12,857.143 shares as well as the subsequent issuance of 5,359 bonus shares of Inofast Mfg., Inc. stock, which petitioner requested the Court to rescind, were performed in total disregard of the statute, as follows:

The three transactions that promulgated the first 12,857.143 share issuance (which first allowed defendants to acquire unlawful control of Inofast) were found by the District Court to have been performed without *"Norman's* (petitioner, who, previous thereto, was a director and majority shareholder of Inofast) ***knowledge or approval*** (Finding ## 22, 23, 24 and 25, Memorandum and Order, dated February 12, 1996).

Additionally, the record clearly established that all the above disputed shares had been issued without any consideration, as follows: as per 5,357.143 shares to defendant Leigh Bardsley (Transcript PI Hearing January 3, 1996 ("1/3"): 40, 44, 46-48, 55-58, 60, 76-78, 142, 149-50); as per 2,142.857 shares to defendant Scott Bardsley (Transcript PI Hearing October 5, 1995 ("10/5"): 44 and 1/3: 38); as per 5,357.143 shares to defendant Dave Miller at a total ***cost*** to the corporation of $21,037.46, by way of a bonus and thereto related residual costs (1/3: 40, 43-44, 46-48, 55-58, 60, 142, 149-50).

The only business purpose for the issuance of the disputed stock proposed by defendants - as was suggested to justify the shareholders agreement, whose authority was improperly and secretly invoked to issue said stock - was *"to get Guy Malick and Dave Miller's expertise back into the business"* (Defendants', Scott Bardsley, Leigh Bardsley and Dave Miller, "Proposed Findings of Fact" No. 11.) By the time the shareholders' agreement was secretly invoked to authorize the issuance of stock in dispute, Guy Malick's intended shareholders' interest had already been "extinguished" (1015: 14; 1/3: 12, 13, 73, 74; Exhibit 30) and defendant, Dave Miller, contradicted the above contention in his letter, dated September 15, 1992,

(P. 36, 1/3: 51-53, 92, 95) by the following statement: *"I did not want to be involved as a shareholder anyway."*

As quoted from the District Court's Finding No. 25: *"Thus, Scott caused 12,857 additional shares to be issued without Norman's knowledge or approval. These shares were voted in such a manner as to allow Scott to gain control of the board of directors."* (Emphasis added)

Therefore, Scott, (a) without the knowledge or approval of the board of directors - not having permitted petitioner, as a director of the board, to participate in that transaction - caused Leigh Bardsley and Dave Miller and himself to receive watered shares; (b) without adequate consideration and; (c) without any business purpose so as to effectuate Scott's control of Inofast. The absence of *each* of the above requisite elements for valid stock would render such stock void. The collective absence of *all* the above elements proves, beyond any reasonable doubt, that the 12,857.143 shares issued are invalid, as a matter of law.

Paraphrasing the seminal case that initially established a private 10b-5 cause of action, *Kardon v. National Gypsum*, 73 F.Supp. 798 (significantly, a Eastern District of Pennsylvania case) at 802: *"The plaintiffs case was established when the defendants' duty and its breach were proved. This was done by showing that the defendants were officers* (Scott was and is the "controlling person") *and directors* (of Inofast) *and that they disposed of the bulk of the corporate assets to an outsider* (Scott caused Inofast to "water" Inofast's only valid 30,000 authorized and issued shares with 18,216.143 unauthorized and unpaid shares - whereby that watered stock represents over 60% of the previous outstanding stock), *for* (Scott's) *own benefit, without disclosing the transaction to* (petitioner, a then majority shareholder and director) *or giving (him) an opportunity to participate in it. The remedy follows. . . . The trust res in this case was the corporate assets, and when those assets were disposed of by an undisclosed* (invocation of a void contract) *the cause of action was complete. Certainly the plaintiffs could have elected to ask for rescission. . . ."* (emphasis added)

See also *Shell v. Hensley*, 430 F. 2d 819, at 827: *"When a person who is dealing with a corporation in a securities trans-*

action denies the corporation's directors access to material information known to him, the corporation is disabled from availing itself of an informned judgement on the part of its board regarding the merits of the transaction. In this situation the private right of action recognized under Rule 10b-5 is available as a remedy for the corporate disability."

From *Triplex Shoe Co. v. Rice* (152 A 342 at 342-43): "(N)*o par value stock issued without consideration . . . being fixed by statute held invalid and without right to vote."* (emphasis added)

Petitioner's request in District Court for equitable relief, to rescind the 18,216.143 shares, was therefore validated both on its factual merits and as a matter of law. The District Court's denial of preliminary injunctive relief in its Order dated February 12, 1996 and its subsequent dismissal of petitioner's federal claims in its Order, dated February 20, 1996, ignored the basis for petitioner's equitable prayer for relief, by refusing to rule on the merits of petitioner's motion. The established factual basis of petitioner's securities claim gives rise to a conclusion of law that said stock is, quite simply, counterfeit. The District Court's dismissal of petitioner's security claim with regard to the initial disputed 12,857.143 stock issuance on the solitary ground that any thereto attached liability was time barred, did not make those counterfeit shares legal. The District Court therefore permitted those illegally issued shares to stand, the continued exercise of which is in clear violation of the statute. This formed the basis for the petition for Writ of Mandamus, to compel compliance with the statute *("a substitute for a finding of irreparable harm (Instant Air Freight Co. v. C.F. Air Freight, Inc.,* 882 F.2d 797 at 803, 3rd Circuit)).

Clearly, the vote of 18,216.143 illegally issued shares at the upcoming Annual Shareholders Meeting would represent a continued *practice or course of business which operates or would operate as a fraud upon the corporation.* Such conduct is in violation of Rule 10
b-5. See also *Commonwealth v. Coward, Pa.,* 414 A.2d 91 at 98, citing *Pa. P. U. C v. Israel:*

"At the hearing the Commonwealth has made a prima facie showing that the defendants are operating taxicabs in violation of law. The argument that a violation of law can be a benefit to the public is without merit. When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable harm."

Petitioner has made an identical and simultaneous motion for preliminary and permanent injunctive relief, which he renewed in his pending action, 94-11292, in the Court of Common Pleas of Montgomery County on the basis of the District Court's February 12, 1996 Findings of Fact, under Pennsylvania State law (a copy of said motion is attached). The District Court's denial of appellant's request for preliminary injunctive relief and the Third Circuit Court of Appeal's denial of appellant's corresponding petition for Writ of Mandamus, should it be permitted to stand, would set a confusing precedent for the State Court. Under Pennsylvania State Law, a Supreme Court Ruling (*Glenn v. Kittanning Brewing Co.*, 259 Pa. 510, 103 A 342) found that *"where the question of control of (a) corporation is involved"* (as is given in appellant's case) that *"the remedy at law for damages for an improper sale of stock may be entirely inadequate. . ."*. The core issue of the above cited case (plaintiffs were deprived of their majority **control** through an improper corporate share issuance), as well as the requested relief (injunctive request for a reinstatement of plaintiffs rightful majority control), are identical to those of appellant's case. The District Court distinguished appellant's case by denying injunctive relief on the sole basis that appellant had not demonstrated "irreparable harm". Obviously, in contradiction thereto, the Pennsylvania Supreme Court considers the improper deprivation of rightful majority control for which *"the remedy at law . . . may be entirely inadequate"* - without specifically using the identical words - to represent **irreparable harm.** See also: *Deckert v. Independence,* 61 S.Ct. 229; *Fraser Fund v. Fraser,* 40 A.2d 22; *In re Alpha-Omega Communications, Inc.,* 52 Bankruptcy Reporter 846 and *Asarco v. Weeks,* 511 F.Supp. 468.

District Court error that demonstrate pervasive bias

The District Court, in its Memorandum dated February 20, 1996, confirmed that appellant had commenced his federal court action by filing a complaint on April 19, 1995. The District Court dismissed petitioner's exchange act claims on the *exclusive* ground that the alleged 12,857.143 share issuance violation was time barred under the 1 year discovery requirement of *Lampf,* thereby completely ignoring petitioner's separate 5,359 bonus share issuance claim which was later effectuated. In restating the factual background of petitioner's complaint, the District Court confirmed that "(i)*t was therefore not until the 1994 shareholders' meeting convened that Mr. Perilstein informed Norman* (appellant) *that Scott had received the 5,359 bonus shares.*" (page 6, Slip Opinion, February 20, 1996). The 1994 shareholders' meeting was convened on April 25, 1994. The time that expired between the discovery date of the bonus share violation and the commencement of petitioner's thereto related complaint was exactly 359 days, most definitely within the requisite 365 days of *Lampf.* It is therefore inexplicable that the District Court dismissed petitioner's separate and distinct 5,359 bonus share issuance violation claim. The dismissal of that claim was clear error. The District Court's denial of reconsideration of the above error demonstrates bias.

There is authority since *Lampf* that the one year limiting discovery prong is not predicated on when the fraud should have been reasonably discovered, but on when the facts constituting the fraud were actually discovered. See *Wemer v. Satterlee, Stephens, Burke & Burke,* 1992 CCH 96, 928 citing *re Data Access Systems Securities Litigation,* 843 F.2d 1537 (**3rd Cir.**) at 93,892: *"the proper period of limitations for a complaint charging violation of 10(b) and Rule 10b-5 is one year after the plaintiff* ***discovers the facts constituting the violation*** *. . . " Id.* at 1550 (emphasis added). See also *Hauman v. Illinois Power Company,* 1992 CCH 96,882 at 93,605: *"Thus it seems clear that the statute of limitations adopted by the Supreme Court for actions under §10(b) begins to run* ***only upon actual discovery of the facts constituting the fraud, not when Plaintiffs want inquiry notice."*** (emphasis added).

By dismissing petitioner's derivative Exchange Act claim as time barred under the one year discovery prong of *Lampf,* the District Court failed to explain how knowledge was imputed to the corporation, to start the one year requisite discovery "countdown". Petitioner's amended complaint clearly stated that, despite his many requests, defendants never produced ***any*** written proof of a corporate resolution relating to the issuance of 12,857.143 shares. Defendants, as the controlling persons of the corporation, were under a fiduciary duty to produce documentation to formalize such a significant corporate legislative act. The absence of a formal corporate resolution, authorizing the issuance of the disputed 12,857.143 shares, renders the corporation without knowledge of how, when and under what authority that transaction was performed. Because Inofast has yet to be formally informed of the above transaction, appellant's thereto related derivative claim cannot be time barred. See *Goldberg v. Meridor,* 567 F.2d 209, at 216, Footnote 6: *"Even the majority panel opinion in Schoenbaum recognized that,* 405 F.2d 211, *knowledge of the corporation's officers and agents is not imputed to it when there is a conflict between the interests of the officers and agents and the interests of the corporate principal. . . . Therefore, a corporation may be defrauded in a stock transaction even when all of its directors know all of the material facts, if the conflict between the interests of one or more of the directors and the interest of the corporation prevents effective transmission of material information to the corporation, in violation of Rule 10b-5(2)."* Petitioner has clearly pled that he, as a director, was not informed (as factually confirmed by the District Court Finding # 25, Slip Opinion, February 12, 1996) of the above transaction, and that said transaction was in conflict with the interest of the corporation. The District Court's dismissal of petitioner's derivative claim on the basis that the corporation must have known that the shareholders' agreement had been illegally executed so as to authorize the disputed 12,857.143 share issuance over one year before the complaint was filed was clear error.

Nor did the District Court adequately explain how requisite knowledge could be reasonably attributed to petitioner

until August 22, 1994, when he was first informed ***in writing*** that the disputed 12,857.143 shares had been issued on the authority of the shareholders' agreement. The fact that the shareholders' agreement was therefore illegally performed is the basis for appellant's §29(b) claim brought in connection with a thereto related 10(b) and 10b-5 violation. Petitioner consistently stated - even before he was informed of the fraudulent 12,857.143 share issuance - that the shareholders' agreement was void because it had been effectively breached before it could be properly implemented. Those were the facts that petitioner also pled in his amended complaint.

The District Court's statute of limitations analysis was essentially the following: "(T)*he information* (appellant) *possessed when he filed the initial suit in Montgomery County was sufficient to support his Exchange Act claim. Since Norman concedes that he filed that action on December 2 1993, and that he assumed that Defendants were pointing to the 1989 shareholders' agreement as the justification for the disputed transactions before he filed the first lawsuit, his 1995 filing of the Exchange Act claim in this Court was outside the bounds of the limitations period.* " (Emphasis added)

The December 2, 1993 action was premised on the fact that the shareholders' agreement had been breached by way of the Guy Malick Deferred Compensation Agreement (executed on June 5, 1992), which rendered it from thereon effectively void. The above facts, as known to petitioner as of December 2, 1993 and as he so stated in his initial state court action (93-24277), actually conflicted with the "assumption" that defendants had invoked the 1989 shareholders' agreement to authorize the issuance of the disputed shares.

The District Court therefore failed to explain how petitioner's ***suspicion*** - that defendants had indeed secretly and illegally invoked the shareholders' agreement - became a ***fact*** upon which he could base a federal securities claim. Any plaintiff who brings such a claim on the basis of an "assumption" or a "suspicion" invites sanctions. Petitioner's situation was considerably more difficult because he would have been compelled to sue his father and twin brother for securities fraud - which was the last thing he wanted to do - before he

could factually substantiate such a dramatic claim. Additionally, petitioner had every right to rely on defendants' non-disclosure breach (who had not given petitioner any information which they were under a duty to disclose) to estop them from invoking the affirmative defense of the statute of limitations, which would otherwise reward their concealment fraud.

The subsequent 5,359 bonus share issuance violation was in breach of the shareholders' agreement, as alleged in petitioner's amended complaint under §59(g)(5)ii at page 22. The shareholders' agreement incorporated the fundamental understanding that the designee shareholders' preemptive rights would be protected. Those rights were clearly repudiated by the 5,359 bonus share issuance to Scott. Using the benefit of hindsight, the bonus share issuance represented the second intentional breach of the shareholders' agreement; whereby said breach was disclosed while a lawsuit questioning the validity of that very same agreement was pending. For petitioner to presume that defendants were so audacious as to first illegally invoke the shareholders' agreement, to then, shortly thereafter, breach it, would have been totally unreasonable. The disclosure of the 5,359 bonus share issuance therefore caused petitioner to withdraw his original complaint and replace it with the action now pending in State Court which, accordingly, makes no reference to the shareholders' agreement. The District Court's dismissal of petitioner's securities claims demonstrated a biased disregard of the facts pled.

The District Court, in its analysis of appellant's RICO claim (page 14, Slip Opinion February 20, 1996), erroneously concluded that, "(t)*hus, the 1989 shareholders' agreement, according to a fair reading of the complaint, was merely a post hoc justification for the allegedly improper issuance of shares, and not part of the scheme.*" To state that the shareholders' agreement was not pled as "part of the scheme" is not only a misrepresentative reading, it actually eviscerates appellant's complaint. By way of ***any*** fair reading of petitioner's amended complaint, the shareholders' agreement was fraudulently induced; it was fraudulently and selectively invoked without having been legally implemented; it was substantively breached; it was invoked - although void, by way of previous

breach - to illegally authorize the issuance of the disputed 12,857.143 shares (which was the core securities violation pled under §29(b) in connection with Rules 10(b) and 10b-5) and; finally, it was breached by way of the second illegal bonus share issuance.

In dismissing appellant's RICO claim, the District Court dealt only with an analysis of the sufficiency of the amended complaint's pattern of racketeering pleadings under RICO. The District Court did not even consider petitioner's § 1962(b) RICO claim. Of the four substantive RICO violations, § 1962(b) is the most straightforwardly formulated and the least difficult to interpret:

> *"It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain . . . control of any enterprise . . ."*

The amended complaint pled that *defendants **acquired** control of Inofast* through a pattern of racketeering activity, by way of predicate security violations. Most importantly, appellant pled that *the unlawfully acquired control of Inofast had been, and is continuing to be **maintained.*** A pattern is continuous if it is either close-ended, having lasted for a substantial period of time (over one year under *Tabas*); or if it is open-ended or "continuous" by its very nature. The maintenance of unlawful control of Inofast by defendants (they have clearly not yet relinquished the control they unlawfully acquired) is continuous or open-ended by its very nature, which petitioner adequately pled (see amended complaint §§ 78(c), 80(b), 81, 82 and 84). But appellant went much further; he established, by the weight of the testimony and evidence, a *prima facie* case to support his allegations.

The District Court abused its discretion by not permitting petitioner leave to amend his complaint.

Scott's writing of August 12, 1992 was introduced into evidence during the January 3, 1996 preliminary injunction hearing (P53; Transcript 1/3: 140-42). In that writing, Scott suggested to defendant attorney, Perilstein, that he should be vaccinated from Norman. That suggested "vaccination" was a proposal to manipulate the stock ownership of Inofast and, as such, represented a device or scheme to defraud Inofast and

petitioner in connection with the sale of securities. That was the beginning of the secret stock issuance scheme. Scott's first "vaccination" was administered when the illegally issued 12,857.143 shares were voted at the April 26, 1993 Annual Meeting, *"in such a manner to allow Scott to gain control of the board of directors"* (District Court Finding # 25, Slip Opinion, February 12, 1996). The second "vaccination" was administered when the 5,359 illegally issued bonus shares were additionally voted at the April 25, 1994 Annual Meeting. The third "vaccination" was administered at the April 24, 1995 Annual Meeting when the total combined 18,216.143 illegally issued shares were again voted. Two years lie between the first "vaccination" in April 1993 and the most recent "vaccination" in April 1995, a substantial amount of time under the most conservative close-ended analysis of RICO. But that is only "window dressing" in view of the fact that the above scheme represents a continued practice or course of business which operates as a fraud upon the corporation and petitioner, in connection with the sale and purchase of 18,216.285 shares of Inofast stock (a violation of 10b-5), and a scheme to unlawfully maintain control of Inofast by way of consecutive and continued voting of those unlawfully acquired shares (a violation of 1962(b) RICO). The District Court's dismissal of petitioner's RICO claims was error.

For the reasons presented above, petitioner respectfully requests that the Court of Appeals for the Third Circuit enjoin defendants' illegally maintained control of Inofast and to put a final end to defendants' continued benefit from the "fruit of their fraud" - a phrase quoted from Judge Greenberg's opinion, *U.S. v. Antar,* 53 F.3d 568 at 583, 3rd Circuit, made with reference to the ownership of stock in a RICO conspiracy context.

Norman Bardsley

pro se plaintiff, appellant, petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1224

NORMAN BARDSLEY,

Petitioner

v.

POWELL, TRACHTMAN, LOGAN, CARRLE and BOWMAN, P.C., *et al*

On Petition for Mandamus to the United States District Court for the Eastern District of Pennsylvania (Related to D.C. Civ. No. 95-02287)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge,* and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and SAROKIN, *Circuit Judges*

The petition for rehearing filed by the petitioner, Norman Bardsley, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

Circuit Judge

DATED: May 31, 1996